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IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—v.—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 11, 2007

CAPITAL CASE

Questions Presented for Review

1. Whether the courts below erred in denying a petitioner sentenced to death any opportunity to develop a gateway claim of actual innocence through which he seeks collateral review of his *first* federal habeas petition that has never been reviewed on the merits where: (i) if the facts are fully developed, petitioner may be able to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence; (ii) a hearing is indispensable to the fair and accurate assessment of the reliability of alibi witnesses whose testimonies are crucial to petitioner's showing of actual innocence; (iii) physical evidence, including a rape kit and blood-stained clothing, has never been subjected to DNA testing; (iv) testing physical evidence could discredit entirely the State's primary witness, a convicted felon and admitted perjurer, whose testimony was the only direct evidence linking petitioner to the crime; and (v) petitioner's allegations in support of his discovery request are consistent with such witness' previous sworn testimony that petitioner did not commit the crime.

2. Whether statutory tolling pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") is warranted where: (i) no state or federal post-conviction court has ever reviewed on the merits the claims raised by a petitioner sentenced to death; (ii) the State failed to provide petitioner adequate access to courts; (iii) the State required death row inmates to request books from the prison law library specifically by volume or title, without providing any index or description of available books or any opportunity to browse through materials before requesting books; and (iv) the State did not provide any legal assistance or counsel for purposes of preparing an initial post-conviction petition.

3. Whether a different equitable tolling standard should apply to a petitioner who stands to be executed without ever having received any collateral review of his conviction and death sentence and who diligently pursued his rights, where petitioner also: (i) was denied any opportunity to develop his claim of actual innocence; (ii) did not have meaningful access to adequate law library facilities; (iii) did not have access to any legal assistance or counsel to assist in preparing a post-conviction petition; (iv) was prevented by the State from meeting with persons who might have been able to assist him; and (v) did not receive notice that the certificate of judgment in his direct appeal had been entered and therefore did not know that the limitations period for filing a state post-conviction petition had begun to run.

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Petitioner Thomas D. Arthur, an indigent inmate sentenced to death, respectfully petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit, dated June 21, 2006 and August 14, 2006, affirming the judgment of the United States District Court for the Northern District of Alabama, dated December 4, 2002.[1]

OPINIONS BELOW

The district court's memorandum of opinion is unreported and reprinted in the appendix hereto at pages A1–24. The district court's memorandum of opinion denying Mr. Arthur's motion to alter or amend judgment is unreported and reprinted at pages A25–33. The Eleventh Circuit's decision is reported at 452 F.3d 1234 and reprinted at pages A34–61. The Eleventh Circuit's decision on petition for rehearing is reported at 459 F.3d 1310 and reprinted at pages A62–64.

JURISDICTION

The district court entered its memorandum of opinion on December 4, 2002. The district court entered its memorandum of opinion denying Mr. Arthur's motion to alter or amend judgment on June 4, 2003. The court of appeals' decision was entered on June 21, 2006. The court of appeals' decision on petition for rehearing was entered on August 14, 2006. On September 21, 2006, Justice Thomas extended the time for filing a petition for writ of certiorari to January 11, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Mr. Arthur is not proceeding *in forma pauperis* because pro bono counsel have volunteered to pay the filing fee on his behalf.

STATUTE INVOLVED

28 U.S.C. § 2244(d)(1) provides in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> * * *
>
> (B) the date on which the impediment to the filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action
>
> * * *

STATEMENT OF THE CASE

A. Relevant Facts

On February 1, 1982 at 9:12 a.m., the police responded to a call at the Wicker residence in Muscle Shoals, Alabama, where they found Judy Wicker lying on the floor with traces of blood on her face and her sister Teresa Rowland kneeling beside her. (R.1-22-T.R. 310–11, 322, 337–42)[2] The police also found Troy Wicker's body in the bedroom with a single gunshot wound to the right eye. (R.1-22-T.R. 318–20)

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[2] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. The record of Mr. Arthur's third state trial is attached to the State's Amended Answer. (R.1-22) "T.R. ___" denotes references to the reporter's trial transcripts, and "C.R. ___" denotes references to the clerk's record.

The police collected physical evidence from the crime scene, including Judy Wicker's blood-stained clothing and torn undergarment (R.1-22-T.R. 365–66), vacuum sweepings, hair samples (R.1-22-T.R. 368), shell casings (R.1-22-T.R. 363–64), and a pillowcase with gunpowder flakes (R.1-22-T.R. 367). The police also dusted the area for latent fingerprints (R.1-22-T.R. 368) but did not search Judy Wicker, her sister, or any of their possessions (R.1-22-T.R. 383–85). The police located Judy Wicker's 1981 Buick Riviera, which had been abandoned in a parking lot; the police searched it and found a wig, hair samples, and latent fingerprints. (R.1-22-T.R. 370–71) The murder weapon was never recovered. (R.1-22-T.R. 352)

After the shooting, Judy Wicker was taken to the hospital and remained there for several days. (R.1-22-T.R. 776) She suffered "a bruise around her left eye, a laceration of her left upper lip, two chipped teeth, and an abrasion on her left hip." *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192–93 (Ala. Crim. App. 1983). Moreover, a rape kit was prepared and seminal fluid collected. (A65, A70) In response to questioning by investigators at the hospital, Judy Wicker provided the following account of the crime: She returned home after dropping her children off at school. *Wicker*, 433 So. 2d at 1194. When she entered her house, she found an African-American man burglarizing her home. *Id.* at 1192, 1194. The intruder raped her, knocked her unconscious, and then shot Troy Wicker. *Id.* at 1194.

Judy Wicker was eventually charged with her husband's murder under the theory that she killed him to collect approximately $90,000 in life insurance proceeds. (R.1-22-T.R. 831) At her trial in 1982, she testified under penalty of perjury to the same version of events that she had related to the investigators. *Wicker*, 433 So. 2d at 1192–94. Despite her claims of innocence, Judy Wicker was convicted

of murdering her husband and was sentenced to life imprisonment. (R.1-22-T.R. 794–95)

At Mr. Arthur's trial in 1991,[3] Judy Wicker gave a completely different account of the murder. (R.1-22-T.R. 787) Although she previously had sworn under oath that Mr. Arthur was not involved in the murder of her husband, she now claimed that she, along with Teresa Rowland and her sister's boyfriend, Theron McKinney, had decided to kill Troy Wicker, and that she had paid Mr. Arthur to pull the trigger. (R.1-22-T.R. 776, 781, 800) She also paid Rowland $6,000 and gave McKinney jewelry and a Trans Am in exchange for their assistance in carrying out the murder. (R.1-22-T.R. 780) The State of Alabama, however, never prosecuted Rowland or McKinney.[4]

At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. In return for her testimony, the state prosecutor, Gary Alverson, promised to make a parole recommendation on her behalf.

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[3] The trial court permitted Mr. Arthur to represent himself. Although the court was aware that Mr. Arthur's decision was the result of his intense frustration with his lawyer's lack of communication and attention to his case, the court granted Mr. Arthur's request without first conducting an inquiry to ensure that he voluntarily and knowingly waived his rights.

[4] The failure of the State to pursue the investigation and prosecution of these two suspects is particularly troublesome considering that Teresa Rowland had her own reasons for wanting Troy Wicker dead. She had previously hired Troy Wicker to burn her house down so that she could collect insurance proceeds; however, she was unable to pay him the promised amount, so he had threatened to have her arrested for arson. (R.1-22-T.R. 799–800) Rowland also had the opportunity to murder Troy Wicker—she had her own key to the Wicker residence and was free to come and go as she pleased. (R.1-22-T.R. 763) Most significantly, Rowland was present at the Wicker house on the morning of the murder. (R.1-22-T.R. 321–22)

(R.1-22-T.R. 823–26, 830–31) Prior to becoming a state prosecutor, Alverson had represented Judy Wicker and assisted her in procuring a deal from the then-prosecutor in exchange for her testimony. (R.1-22-T.R. 825–27) Thus, the state prosecutor—who had an unavoidable conflict of interest because of his prior representation of Judy Wicker—offered her the ultimate deal: assist in the prosecution of Mr. Arthur and obtain early parole.

Although no physical evidence linked Mr. Arthur to the murder of Troy Wicker, he was convicted and sentenced to death for this crime. The hair samples and fingerprints found at the crime scene and in Judy Wicker's 1981 Buick Riviera were tested, but they did not match Mr. Arthur's. (R.1-22-T.R. 379) Mr. Arthur's conviction was based almost exclusively on the testimony of Judy Wicker, a convicted murderer and admitted perjurer.[5]

The penalty phase that followed lasted less than an hour and a half. (R.1-22-T.R. 1165, 1236) Mr. Arthur's co-counsel offered no mitigation testimony and introduced only a handful of exhibits relating to Mr. Arthur's good behavior

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[5] The circumstantial evidence introduced to support Judy Wicker's story was weak. Officer Lang testified that he observed Judy Wicker driving past a school crossing twice prior to 8 a.m. This testimony just as credibly supported her initial story that an unknown intruder had raped her in her home and killed her husband. Pat Halliday testified regarding Mr. Arthur's possession of a large amount of money after the murder, but this testimony was also consistent with evidence that Mr. Arthur had won money in a poker game. Debra Philips testified merely that Mr. Arthur threw a garbage bag into the Tennessee River. Patricia Green's testimony that she provided Mr. Arthur with .22 caliber bullets and that Mr. Arthur told her he was going to kill someone with them was called into question when Ronald Spears testified that Green lied as a result of being threatened. Moreover, the State's criminologist was unable to match such bullets with the spent shell casings recovered from the crime scene.

in prison prior to 1981, which he had obtained from the record on appeal from one of Mr. Arthur's previous trials. (R.1-22-T.R. 1168) In a lengthy summation, Mr. Arthur urged the jury to recommend a death sentence and repeatedly guaranteed that he would never be executed because both his conviction and death sentence would be reviewed and reversed on appeal. (R.1-22-TR. 1181) He then informed the jury that he had been convicted and sentenced to death twice before in this case by two other juries. (R.1-22-T.R. 1188)

B. Post-Conviction Proceedings

Throughout post-conviction proceedings, Mr. Arthur diligently tried to develop facts relating to his gateway claim of actual innocence and tolling claims, but he faced insurmountable obstacles at every turn.[6] For example, he sought access to the trial exhibits but was informed that an order from the state trial judge would be required. Mr. Arthur accordingly filed such a motion. Instead of ruling on this motion, the trial judge transferred the exhibits to the federal habeas judge, who denied Mr. Arthur's request by order dated April 30, 2002. (R.1-29)

Similarly, Mr. Arthur filed a motion on June 3, 2002 requesting discovery limited to facts relating to his gateway claim of actual innocence. (R.1-33) He sought to conduct tests that had never been performed on various pieces of physical evidence. *Id.* To substantiate his claim of innocence and further demonstrate the need for discovery, Mr. Arthur submitted affidavits from two alibi witnesses, Alphonso High and Ray Melson, who stated that they had seen Mr. Arthur on the morning of Troy Wicker's murder.

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[6] In July 1991, Mr. Arthur's trial counsel filed a "Motion to Inspect, Examine and Test Physical Evidence." (R.1-22-C.R. 61)

(A71 ¶ 3; A79 ¶ 1) The State of Alabama submitted countering affidavits from these witnesses. (A73; A81) Consequently, Mr. Arthur sought a hearing to explore the questionable circumstances under which they executed these new affidavits, including the bases for Mr. High's statement that he did not want to be "carried away" in handcuffs (A78 ¶ 6), and Mr. Melson's statement that he was answerable only to an assistant attorney general representing the State (A90 ¶ 20).

In spite of the clear need for discovery and a hearing, the district court denied Mr. Arthur's requests, rejected his statutory and equitable tolling claims, and dismissed his petition as time-barred on December 4, 2002. (A23–24) Mr. Arthur timely moved to alter or amend judgment on December 18, 2002 (R.1-57), which was denied on June 4, 2003 (A25–26). Mr. Arthur applied for a certificate of appealability on August 6, 2003 (R.1-65), which was granted in its entirety by the district court on August 11, 2003 (R.1-66).

The Eleventh Circuit affirmed. With respect to Mr. Arthur's requests for a hearing and discovery, the appellate court upheld the district court's finding that Mr. Arthur failed to satisfy the due diligence requirement of Section 2254(e)(2) of AEDPA. (A52) Mr. Arthur timely filed a petition for rehearing and rehearing en banc on July 11, 2006, arguing *inter alia*, that the due diligence requirement of Section 2254(e)(2) does not apply to his gateway claim of actual innocence.

On August 14, 2006, the Eleventh Circuit denied Mr. Arthur's petition for rehearing and rehearing en banc but also modified its discussion regarding his requests for a hearing and discovery. (A62–64) Specifically, the Eleventh Circuit recognized that the "provisions of 28 U.S.C.

§ 2254(e)(2) for obtaining an evidentiary hearing are not applicable to a petitioner's first federal habeas petition seeking review of a defaulted claim based on an allegation of actual innocence." (A63 n.1) Instead of remanding to the district court, who erroneously applied Section 2254(e)(2) in denying Mr. Arthur's request for a hearing, the Eleventh Circuit determined that Mr. Arthur's alibi witnesses were not credible. (A63)

REASONS FOR GRANTING THE PETITION

I. Mr. Arthur Is Entitled to a Hearing and Discovery to Develop His Gateway Claim of Actual Innocence.

As this Court has recognized, the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). Mr. Arthur—who faces execution without ever having received any state or federal post-conviction review of his trial and death sentence—seeks to develop further his gateway claim of actual innocence through which he "must pass to have his otherwise barred constitutional claims considered on the merits." *Schlup* v. *Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)).

Unlike a substantive claim of innocence, a gateway claim of actual innocence is "procedural" and "does not by itself provide a basis for relief." *Schlup*, 513 U.S. at 314–15. The "evidence of innocence" for a gateway claim therefore carries "less of a burden;" instead of being subject to a "clear and convincing" standard, a petitioner at the gateway stage "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new

evidence." *Id.* at 316, 327. "The paramount importance of avoiding the injustice of executing one who is actually innocent" merits application of a less exacting standard. *Id.* at 326. By failing to correctly apply *Schlup* and its progeny to Mr. Arthur's requests for a hearing and discovery, the courts below improperly denied Mr. Arthur any opportunity to develop his gateway claim of actual innocence.

A. A Hearing Is Warranted to Examine Mr. Arthur's Alibi Witnesses.

In determining whether to grant an evidentiary hearing, courts "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332. Courts may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability" of the new evidence of innocence. *Id.* As *Schlup* made clear, however, a delay in presenting exculpatory witness statements is not dispositive of their credibility. *See id.* at 331 (rejecting appellate court's reasoning that the actual innocence standard was not met because of "the eleventh-hour nature of the information").

Mr. Arthur has presented powerful evidence of his innocence. In their original affidavits, both Mr. High and Mr. Melson, independently and without communicating with each other, provided specific, consistent details about Mr. Arthur's visit on the morning of Troy Wicker's murder. (A91 ¶ 23) Both were confident in their recollections: Mr. Arthur stopped by Copper Mobile Homes in Decatur some time between 8 a.m. and 9 a.m.; they were on their way to Birmingham to set up a trailer; Mr. Arthur stayed for approximately 30 minutes; he acted like he always did; he was looking for work; the day after Mr. Arthur's visit they heard about Troy Wicker's murder; and when they heard that Mr. Arthur had been arrested they realized that they had seen

him on the morning of the murder. (A71–72 ¶¶ 3–5; A79–80 ¶¶ 1–4)

The recollections of Messrs. High and Melson are significant because they directly contradict Judy Wicker's testimony that Mr. Arthur was with her that morning. (A11) Based on her testimony regarding the events immediately preceding the murder, Mr. Arthur could not have visited Messrs. High and Melson in Decatur and shot Troy Wicker in Muscle Shoals before 9:12 a.m. when the police arrived at the Wicker residence. Indeed, the State of Alabama has not disputed that these original affidavits, if true, establish that Mr. Arthur was nowhere near the Wicker residence when Troy Wicker was murdered.

The State procured its own affidavits from Messrs. High and Melson, who retreated from their original testimonies under questionable circumstances. Mr. Arthur's investigator and counsel met with Mr. High and his assistant, Teresa McDonald, to determine whether Mr. High had been truthful in his initial affidavit. Ms. McDonald stated that two representatives from the State had visited Mr. High, and that one was carrying a gun in his holster. (A77 ¶ 5) Mr. High also expressed concern that he has a family to support and a business to run, and that he did not want to be "carried away" in handcuffs. (A78 ¶ 6) Prior to meeting with State representatives in this case, Mr. High had never voiced any such concerns.

For his part, Mr. Melson, after meeting with State representatives, suddenly insisted that he was on "some strong medication, pain and otherwise" when he signed his original affidavit. (A81) Mr. Melson, however, appeared fully coherent and alert that day. On August 2, 2002, Stephen Gustat, Mr. Arthur's investigator, met Mr. Melson to show him a draft of his affidavit. (A87 ¶ 11) They had

originally agreed to meet at Mr. Melson's home but decided later to meet at Mr. Gustat's hotel. Mr. Gustat offered directions to his hotel but Mr. Melson knew exactly where it was located. (A87–88 ¶ 12) Mr. Melson arrived with Mrs. Melson and they had just come from a tanning salon; Mr. Melson joked that the new bulbs at the salon caused him to burn a little. *Id.*

While in the hotel room, Mr. Melson carefully reviewed the draft affidavit, asked questions, made corrections, and commented on omissions. (A88 ¶¶ 13–14) In particular, Mr. Melson noticed that his last name was spelled incorrectly, that the specific destination of the double-wide trailer, a suburb of Birmingham, was not included in the draft, and that the fact that the trailer had gotten stuck in clay was not mentioned. *Id.* at ¶ 13. During this meeting, Mr. Melson did not exhibit any signs of being under the influence of pain medication and instead complained of back pain. *Id.* at ¶ 11.

Under these circumstances, a hearing is indispensable to the fair and accurate assessment of the reliability of Messrs. High and Melson. Where, as here, a "showing of actual innocence *may* be made out," a district court "should conduct a limited evidentiary hearing at which the affiants whose testimony the court believes to be crucial to the showing of actual innocence are present and may be cross-examined as to veracity, reliability and all of the other elements that affect the weight to be given the testimony of a witness." *Schlup*, 513 U.S. at 341–42 (emphasis added) (Rehnquist, C.J., dissenting).

In rejecting Mr. Arthur's request for a hearing, the Eleventh Circuit stated that the credibility of the original affidavits of Messrs. High and Melson "is fundamentally wounded by the affiants' own substantial retraction of the

very content advanced to support Arthur's new alibi." (A63) In the absence of any hearing, however, the Eleventh Circuit erred in making a credibility determination and disregarding altogether Messrs. High's and Melson's testimonies "crucial to the showing of actual innocence." *Schlup*, 513 U.S. at 341 (Rehnquist, C.J., dissenting). Such a premature determination is particularly unwarranted in light of the detailed affidavits submitted by Mr. Arthur's investigator and counsel highlighting factual questions that could only be resolved by live testimony. *See, e.g., Battle* v. *Delo*, 64 F.3d 347, 352 (8th Cir. 1995) ("If new evidence calls the credibility of certain witnesses into question, and their credibility figures reasonably in our assessment, remand for an evidentiary hearing may be appropriate."); *Murphy* v. *Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) ("[A] petitioner is entitled to an evidentiary hearing only where a factual dispute, if resolved in his favor, would entitle him to relief, and not where a petitioner's allegations are merely conclusory allegations unsupported by specifics.").

Notwithstanding the facts undermining the reliability of the affidavits procured by the State, the Eleventh Circuit concluded that the original affidavits of Messrs. High and Melson "do not furnish good cause to believe that the *facts*, if 'fully developed' through the discovery sought, would be any *different from those found at trial*." (A63) (emphasis added) In making this determination, the court below essentially applied the "sufficiency of the evidence" standard articulated in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), to deny Mr. Arthur's request for a hearing. But *Jackson* has no relevance here. Although "the mere existence of sufficient evidence to convict would be determinative of petitioner's claim" under *Jackson*, "that is not true" under *Schlup*. *Schlup*, 513 U.S. at 330. *Jackson*'s standard "focuses on whether any rational juror could have convicted" and "looks

to whether there is sufficient evidence which, if credited, could support the conviction," but *Schlup*'s "more likely than not" standard considers "what reasonable triers of fact are likely to do" in light of the new evidence. *Id.* In applying *Jackson* instead of *Schlup*, the Eleventh Circuit determined that because Mr. Arthur failed to demonstrate that the evidence at trial was insufficient to support his guilty verdict, the testimony of alibi witnesses cannot demonstrate actual innocence. Thus, the Eleventh Circuit imposed too high a burden by requiring Mr. Arthur to demonstrate *no* jury could have convicted him.

The Eleventh Circuit's application of *Jackson* clearly runs afoul of *Schlup*, which instructs that a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. Under the *Schlup* standard applicable here, Mr. Arthur is entitled to a hearing.

B. Mr. Arthur Has Demonstrated Good Cause for Discovery.

A habeas petitioner is entitled to discovery under the Federal Rules of Civil Procedure for "good cause" shown. RULES GOVERNING § 2254 CASES, Rule 6(a). Where, as here, specific allegations provide reason to believe "that the petitioner *may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy* v. *Gramley*, 520 U.S. 899, 908–09 (1997) (emphasis added) (quoting *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969)). In denying Mr. Arthur's discovery request seeking to develop further his gateway claim of actual innocence, the courts below misapplied the good cause standard.

In support of his gateway claim, Mr. Arthur seeks to conduct DNA tests at his own expense on various pieces of evidence for the first time, including Judy Wicker's blood-stained clothing, her rape kit, and hair samples collected from the crime scene and Judy Wicker's automobile. During her trial, Judy Wicker testified that a burglar had raped her, knocked her unconscious, and then shot Troy Wicker. Her sworn testimony was corroborated by physical injuries she had sustained from a struggle, blood-stained clothing, torn undergarment, and a rape kit that was prepared on the day of the murder.

DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, that he was in Judy Wicker's 1981 Buick Riviera, and that this person was not Mr. Arthur. Such evidence could discredit entirely the only direct testimony linking Mr. Arthur to the murder, because nowhere in Judy Wicker's testimony did she allow for the possibility that two persons killed Troy Wicker.

In rejecting Mr. Arthur's discovery request, the Eleventh Circuit stated that his allegations were speculative and that "discovery cannot be ordered on the basis of pure hypothesis." (A63) Mr. Arthur's allegations are not mere speculation, however; they are consistent with Judy Wicker's previous sworn testimony that a burglar shot her husband. Moreover, in seeking discovery, "there is no requirement that [Mr. Arthur] provide evidence corroborating his allegations of what the test results will show." *Jones* v. *Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997). Indeed, to establish a gateway claim of actual innocence, Mr. Arthur need not present new facts that "unquestionably establish" his innocence. *Schlup*, 513 U.S. at 317. The relevant inquiry asks whether, if the facts are fully developed, Mr. Arthur *may* be able to

demonstrate that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.

Under *Schlup*, "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Schlup*, 513 U.S. at 330; *see also House* v. *Bell*, 126 S. Ct. 2064, 2078 (2006). In fact, *Schlup* itself presented an issue of witness credibility: The petitioner presented affidavits to counter the testimony of two eyewitnesses who had testified at his trial. *Schlup*, 513 U.S. at 307–312. As explained above, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. Thus, by totally undermining Judy Wicker's testimony through DNA testing, Mr. Arthur could "raise[] sufficient doubt" about his guilt "to undermine confidence in the result of the trial." *Id.* at 317. Because Mr. Arthur has demonstrated "good cause," the courts below erred in denying him discovery.

II. Because Alabama Failed to Provide Mr. Arthur With Adequate Access to the Courts, Statutory Tolling Is Warranted.

As this Court has recognized, the Constitution requires states to provide inmates with meaningful access to the courts for purposes of pursuing post-conviction relief. *See Bounds* v. *Smith*, 430 U.S. 817, 828 (1977), *aff'd in part, overruled in part by Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). In violation of this fundamental right, the State of Alabama failed to provide Mr. Arthur with meaningful access to adequate law library facilities at Holman Prison, or any legal assistance to prepare an initial state post-conviction petition. This failure to provide access to the courts impeded Mr. Arthur's ability to file a timely petition and thus required

the tolling of AEDPA's one-year statute of limitations until the unconstitutional impediment was removed. *See* 28 U.S.C. § 2244(d)(1)(B). Despite this, the district court determined that access to Holman Prison's law library was adequate—without permitting any discovery on this critical issue—and refused to toll the limitations period. In affirming the court below, the Eleventh Circuit ignored precedent of every other Circuit that has found similar law libraries to be constitutionally deficient.

A. The State of Alabama Failed to Provide Mr. Arthur With Meaningful Access to an Adequate Law Library.

The mere existence of a prison law library is only the beginning of the analysis; the constitutionality of a state's system depends on whether it provides inmates with "[t]he tools . . . that the inmates need in order to attack their sentences, directly or collaterally." *Lewis*, 518 U.S. at 355. As Justice Scalia explained, *Bounds* guarantees "the conferral of the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* at 356. And "it is that capability, rather than the capability of turning pages in a law library, that is the touchstone." *Id.* at 356–57. The Holman Prison law library facilities, however, did not provide Mr. Arthur with the "capability" to challenge his confinement through a post-conviction petition.

Around the same time that the federal and state statutes of limitations for post-conviction petitions began to run for Mr. Arthur, the State of Alabama ceased to update the death row law library at Holman Prison. As the State has conceded, this library "is not a law library that is maintained and kept current," and "is used more as a day room." (A75) The State instead has represented that death row inmates may

"request [a] book" from the general population law library, which "has been maintained current and up-to-date." *Id.* Based on this representation with respect to Holman Prison's general population library, the Eleventh Circuit affirmed the district court's finding that Mr. Arthur failed to "show that he was provided inadequate access to the prison law library." (A56)

In so affirming, however, the Eleventh Circuit disregarded the following undisputed assertions that render such access inadequate:

- Holman Prison officials did not provide inmates with prompt, adequate notice that the death row law library had been discontinued, or that the new procedures applied for obtaining books from the general population library.
- Holman Prison officials did not provide death row inmates with a list or description of books available from the general population library, even though these inmates were required to request books specifically by title or volume.
- Holman Prison officials did not provide death row inmates with any means to reference and cross-reference volumes of the United States Code and various reporters.
- Death row inmates were denied the opportunity to visit the general population library or browse through materials before requesting books.
- Holman Prison's death row law library is deficient under *Bounds*.
- The State of Alabama did not provide death row inmates with counsel or any legal assistance for

> purposes of preparing an initial state post-conviction petition.

The Eleventh Circuit's conclusion that Holman Prison's law library facilities were constitutionally adequate conflicts with decisions from other Circuits on the same issue. Specifically, other Circuits have held that prison systems that do not permit inmates physical access to law libraries but instead rely solely on "bookmobile" or "book paging" systems similar to that utilized by Holman Prison are constitutionally inadequate. *See Ansari* v. *Plummer*, No. 94-15759, 1994 WL 692925, at *1 (9th Cir. Dec. 9, 1994) (holding that a paging system requiring a prisoner to request copies of specific federal cases is unconstitutional); *Morrow* v. *Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (finding a weekly bookmobile to be inadequate access as required by *Bounds* because "[e]ven a quick research project by a trained lawyer may require reference and cross reference to numerous volumes"); *Corgain* v. *Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (recognizing a bookmobile system as a "'Catch 22' because [an] inmate could obtain state law materials only by providing precise citations, and could obtain precise citations only if he could refer to state law materials").

This rationale for rejecting bookmobile and book paging systems is obvious:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance

> discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Williams v. *Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978). As recognized by unanimous authority of other Circuit Courts, Holman Prison's book paging system violated Mr. Arthur's constitutional right of access to the courts.

B. The State of Alabama Failed to Provide Mr. Arthur With Any Legal Assistance or Counsel to Prepare an Initial Post-Conviction Petition.

It is of no consequence that in limited circumstances Alabama courts may provide petitioners with counsel because this assistance, if it comes at all, comes too late. Unlike almost every other jurisdiction that imposes the death penalty, the State of Alabama does not automatically appoint counsel in capital post-conviction proceedings. Such appointment instead is left to the discretion of the post-conviction judge if it "appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person." ALA. CODE § 15-12-23(a). An indigent inmate must first file a Rule 32 petition containing "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." ALA. R. CRIM. P. 32.6(b). Petitions that do not meet this stringent criterion, including those brought by an indigent inmate with no legal assistance or counsel, will be summarily dismissed. *See* ALA. R. CRIM. P. 32.7(d).

From his cell on death row in Holman Prison, Mr. Arthur could not on his own interview witnesses, investigate his claims, or fully disclose the factual bases of

his claims in order to withstand summary dismissal. Moreover, without adequate access to the law library, Mr. Arthur had no way of knowing the requirements for filing a viable Rule 32 petition. Indeed, because a death row inmate in Alabama has no post-conviction counsel until after he files his Rule 32 petition *pro se* and after that petition survives summary dismissal, access to the courts in Alabama for purposes of filing an initial Rule 32 petition can be fulfilled *only* through meaningful access to the Holman Prison law library.

As the Court noted in *Bounds*, it is "irrelevant that [a state] authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17. The "main concern" is to "protect[] the ability of an inmate *to prepare* a petition or complaint." *Id.* (emphasis added) (internal quotation marks and citation omitted).

When Mr. Arthur was deprived of adequate access to the Holman Prison law library and legal assistance to file a post-conviction petition, he suffered actual and severe injury. Due to the State's unconstitutional conduct, Mr. Arthur was unable to prepare a petition for state post-conviction review within the deadline, was subject to less time to seek federal post-conviction review, and was prevented from filing a timely petition for federal relief. Mr. Arthur now faces execution without ever having received any collateral review of his meritorious claims. These harms fall squarely within the category of injury recognized by *Lewis*:

> When any inmate . . . shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of

> filing suit has not been provided, he demonstrates that the State has failed to furnish "*adequate* law libraries or *adequate* assistance from persons trained in the law."

Lewis, 518 U.S. at 356 (citation omitted).

In sum, because the State of Alabama effectively rendered Mr. Arthur incapable of challenging his conviction and sentence, Mr. Arthur was denied access to the courts. Such unconstitutional impediment warrants statutory tolling of AEDPA's limitations period.[7]

III. The Eleventh Circuit's Failure to Apply Equitable Tolling Conflicts With Other Circuits' Application of a Different Standard in Capital Cases.

The Eleventh Circuit refused to apply equitable tolling to the one-year statute of limitations governing Mr. Arthur's petition, relying in part on this Court's decision in *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418–19 (2005). In doing so, the court below applied a standard that conflicts with the standard applied by other Circuits in capital cases, and disregarded this Court's long-standing recognition that the penalty of death is qualitatively different. Under the facts of this case, equitable tolling is warranted.

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[7] At a minimum, Mr. Arthur has demonstrated good cause warranting discovery relating to the law library. He has demonstrated that he *may* be entitled to tolling if the facts relating to the general population library are fully developed. The courts below erred in denying Mr. Arthur's discovery request.

A. Because Mr. Arthur Faces Execution Without Any Collateral Review of His Claims, Less Than "Extraordinary" Circumstances Should Trigger Tolling.

In *Pace*, this Court held that a petitioner seeking equitable tolling of AEDPA's statute of limitations must establish that he has been diligent in pursuing his rights and that "some extraordinary circumstance stood in his way." *Id.* at 418. *Pace* was not a capital case, however, and did not address whether a different standard should apply to toll otherwise time-barred claims of a petitioner who could be executed without any collateral review of his claims.

In addressing this precise situation, the Third Circuit applied a less exacting standard and accepted an otherwise untimely petition of a death row inmate. The court explained:

> [I]f the limitation period is not tolled in this case, [petitioner] will be denied all federal review of his claims. Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions [petitioner] attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the standard would be unfair.

Fahy v. *Horn*, 240 F.3d 239, 245 (3d Cir. 2001). The Seventh Circuit has also acknowledged that an exception to the otherwise applicable standard may exist for capital cases. *See Modrowski* v. *Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (attorney negligence does not rise to an extraordinary

circumstance for the purpose of equitable tolling but "[a]n exception may exist for capital cases"). *But see Johnson* v. *McBride*, 381 F.3d 587, 590–91 (7th Cir. 2004) (death is not to be considered in the equitable tolling analysis).

In contrast, the Fourth Circuit has refused to apply a different equitable tolling standard for petitioners sentenced to death. *See Rouse* v. *Lee*, 339 F.3d 238, 253–56 (4th Cir. 2003) (en banc). Likewise, the Eleventh Circuit rejected Mr. Arthur's argument that the more lenient standard adopted by the Third Circuit should apply here. (A59–61)

As a result of this split among the Circuits, the ability of death row inmates to challenge their convictions and sentences is determined in part by where their post-conviction petitions are filed. The Court should resolve this conflict by adopting the Third Circuit's approach in *Fahy*, which would best serve the interests of justice consistent with this Court's capital jurisprudence.

This Court has stressed that procedural safeguards are particularly necessary where the punishment is death.[8] Indeed, to ensure that the death penalty will be imposed reliably, collateral review of convictions and sentences is an essential part of the death penalty appellate process. *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). It is only through a thorough

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[8] *See, e.g., Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination . . . [and] of the guilt determination."); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (because the "penalty of death is qualitatively different" from even a life sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

evaluation of collateral claims that finality in capital litigation can be justly achieved. A balance must therefore be struck between "the need for finality in death penalty cases with the requirement that a defendant have a fair examination of his claims." 135 CONG. REC. 24,693 (1989) (enacted) (statement of Sen. Thurmond upon introducing S. 1760, a precursor bill to the time limitations and tolling provisions ultimately enacted in AEDPA). Applying the *Fahy* equitable tolling standard to claims that have never been collaterally reviewed on the merits would strike the right balance, by ensuring that no one is executed without due process of law while preventing "abuse of the process." *Fahy*, 240 F.3d at 245.

Like the petitioner in *Fahy*, Mr. Arthur faces execution without any collateral review of his claims, several of which could not have been raised earlier. Mr. Arthur's trial was riddled with constitutional violations.[9] Yet his claims have never been reviewed on the merits by a state or federal post-conviction court. Moreover, Mr. Arthur has consistently maintained his innocence, which is supported in

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[9] Mr. Arthur's Petition for Writ of Habeas Corpus, which the District Court dismissed as untimely, challenged his conviction as unconstitutional on several grounds, including ineffective assistance of counsel and violations of due process, right to a fair trial and right to counsel. Prior to trial, Mr. Arthur's appointed counsel conducted virtually no independent investigation into either the underlying crime or potential mitigating evidence and were consequently wholly unprepared to defend this capital case. Furthermore, the prosecuting district attorney who represented the state at Mr. Arthur's trial previously represented the prosecution's star witness, on whose testimony Mr. Arthur's conviction was based almost exclusively, in connection with her parole proceedings. Moreover, on the first day of trial, the trial court permitted Mr. Arthur to represent himself without first conducting an inquiry into whether Mr. Arthur's waiver of his right to counsel was made knowingly and voluntarily.

part by affidavits of two alibi witnesses who have no reason to lie and who have corroborated each other's testimonies.[10] Yet Mr. Arthur's gateway claim of actual innocence has never been fully developed due to the lower courts' erroneous denial of his requests for a hearing, discovery and DNA testing. If this Court does not intervene, Mr. Arthur will be executed—for a crime he did not commit—without *any* collateral review of his trial and death sentence. Under these circumstances, AEDPA's statute of limitations should be equitably tolled.

B. Mr. Arthur Diligently Pursued His Rights.

Like the petitioner in *Fahy*, Mr. Arthur was also diligent in attempting to access both state and federal collateral proceedings. From 1998 to 2000, Mr. Arthur tried to overcome the hurdles erected by the State of Alabama, including its failure to provide adequate access to the Holman Prison law library or any legal assistance to prepare a post-conviction petition. Mr. Arthur sought post-conviction counsel and wrote countless letters to organizations, lawyers and courts seeking assistance. However, he was unable to obtain counsel or any other legal assistance before both statutes of limitations had run.

Due to the inadequate access to Holman Prison's law library, Mr. Arthur had no way of knowing that indigent death row inmates are entitled to appointed counsel in federal habeas corpus proceedings pursuant to 21 U.S.C. § 848(q)(4)(B). Though it would have been far simpler to write one letter to the district court requesting counsel,

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[10] At least one Circuit court has recognized that a claim of actual innocence may constitute extraordinary circumstances warranting equitable tolling. *See Allen* v. *Beck*, 179 F. App'x. 548, 550 (10th Cir. 2006) (unpublished).

Mr. Arthur instead engaged in a time-consuming and ultimately ineffective letter-writing campaign. No court or lawyer who responded, however, advised Mr. Arthur that he would be entitled to counsel under this provision.

Despite his diligent efforts to gain access to the courts, Mr. Arthur was not able to file a timely petition due to circumstances beyond his control. At the outset, Mr. Arthur was denied the opportunity to file a timely Rule 32 petition in the Alabama courts. He never received the certificate of judgment that triggered the limitations period, and he was not represented by counsel when that certificate was issued on April 7, 1998. By denying Mr. Arthur the opportunity to litigate his claims in state court, the State of Alabama simultaneously denied him the opportunity to toll the limitations period for filing a federal habeas petition.

Moreover, when someone did express an interest in helping Mr. Arthur, the State of Alabama intervened. An investigator offered to help Mr. Arthur in both investigating and finding counsel. But the investigator's written requests to visit Mr. Arthur were denied by Charlie Jones, then Warden of Holman Prison. (R.1-40-Ex. G) Warden Jones also denied the investigator access to Mr. Arthur even after receiving a letter from a lawyer who stated that he was considering representing Mr. Arthur and asked that the investigator be permitted to visit with Mr. Arthur. Thus, the State of Alabama thwarted Mr. Arthur's efforts to pursue his rights and put him in a "Catch-22" situation: he was unable to meet with an investigator who could help develop crucial facts without first obtaining counsel of record, but he could not obtain counsel of record without first meeting with an investigator or setting forth fully the factual bases for his Rule 32 petition.

As this Court has recognized, the equitable tolling doctrine focuses on a prisoner's diligence in "pursuing his rights." *Pace*, 544 U.S. at 418. The steps Mr. Arthur undertook to obtain post-conviction counsel constituted a reasonable exercise of diligence in pursuit of his rights. This is particularly true in light of his factually and legally complicated capital case. Indeed, the "complexity of [the Court's] jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment).

In light of Mr. Arthur's diligence and the circumstances warranting collateral review of his *first* habeas petition that has never been reviewed on the merits, equitable tolling should apply.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

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